IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
ROBERT EARL DILYERD,
Respondent.

CASE NO. 64,956

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DAVID A. HENSON
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida 32014-6183
Phone: 904/252-3367

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Respondent hereby accepts Petitioner's Statement of the Case and Facts with the following additions.

At approximately 9:40 p.m. on September 5, 1981, Deputy Harper approached a parked 1966 blue Mustang for the purpose of warning its two occupants off private property owned by a person who had complained about teenagers partying in the area. (R11, 12,20) The front passenger leaned forward in the seat as if reaching for the floorboard. (R13) Deputy Harper approached the passenger side of the vehicle and requested identification from a Robert Chappell. (R13) A second deputy named Harrison arrived; and Chappell and the Respondent exited the Mustang when directed to. (R14)

Before a teletype check was done and while the two detainees were standing at the right rear of the Mustang, Deputy Harper began to search the inside of the car. (R14,16)

Despite Deputy Harper's testimony that he searched the car to protect himself, the facts adduced at the suppression hearing show that his approach of the car and its occupants was not self-protective in nature. For example, he did not approach the Mustang with his service revolver drawn. (R16) Nor did he bother to wait before receiving teletype results before proceeding. (R15-17) The record even shows that Deputy Harper was in such a hurry to search the car that he did not even pat-down the very person whose movement "created" the asserted justification for the search.

(R23,24) On cross-examination, Deputy Harper admitted he couldn't "specifically recall" frisking either detainee. (R22-24) And, when asked whether Deputy Harrison conducted any type of pat-down, Harper's response was, "I wasn't paying attention". (R15-19)

Robert Chappell testified that he was not frisked prior to the search, and that he was "almost positive" that no frisk of the Respondent occurred. (R22-24)

ARGUMENT

THIS HONORABLE COURT IS WITHOUT JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION SINCE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL REVEALS NO EXPRESS OR DIRECT CONFLICT WITH OTHER DECISIONS OF OTHER COURTS ON THE SAME QUESTION OF LAW INVOLVING THE SAME CONTROLLING FACTS.

In the instant case, Petitioner argues that this Court may exercise its discretionary jurisdiction. In particular, it is alleged that the decision reached by the Fifth District Court of Appeal conflicts with decisions reached by the Third District in State v. Brown, 395 So.2d 1202 (Fla. 3d DCA 1981); and Stevens v. State, 354 So.2d 110 (Fla. 3d DCA 1978).

In Dilyerd v. State, ___ So.2d ____, 9 FLW 333 (Fla. 5th DCA Case No. 82-1127, Opinion filed February 2, 1984), the Fifth District concluded, in part, that:

> This search appears to have been a hunting expedition to see what could be found and the assertion that it was to protect the officers, who had not and were not going to arrest, rings hollow.

The salient issue addressed in Dilyerd, Id., concerned whether the deputy had a right to search Respondent's car, based on probable cause, solely as a result of seeing a front seat passenger make a non-specific or ambiguous hand movement toward the floorboard of the car. In ruling, implicitly, that this

particular search was conducted out of mere curiousity or suspicion, the Fifth District rejected the notion that a right to search based on probable cause arose automatically from the officer's observation of a furtive movement.

The Respondent submits that the two (2) cases cited by Petitioner as being in "direct and express conflict" with the case sub judice cannot be fairly read to mean that an officer will have the right to conduct a warrantless search of an automobile whenever he or she sees a movement that could be construed as movement directed at some object.

In State v. Brown, supra, the Third District held that furtive hand movements by both occupants of a car lawfully stopped, raised an articulable suspicion that the detainees were armed and dangerous. Several factual differences between State v. Brown, supra, and the instant case are worth noting. First, in Brown, the car was stopped based on articulable suspicion of auto theft and driving with an expired license plate. Second, both occupants of the car were making furtive hand movements under the car's seat. Third, because the opinion is silent on the matter, it can only be assumed that the Brown court had no reason to question any disparity between the investigating officer's stated "probable cause" and his failure to take the most basic protective measures prior to the search. Whereas in the case sub judice, Deputy Harper testified he had no intention of arresting the Respondent and his companion for trespass before the search. Also,

the hand movement of the passenger (only) was more ambiguous in the sense that it may well have been limited to the floorboard area. (R13) Lastly, Deputy Harper's investigative actions were simply not those of an officer with a reasonable concern that the detainees were armed and dangerous.

Likewise, Stevens v. State, supra, concerns controlling facts which are distinguishable from the case at bar. There, the investigating officer stopped an apparently intoxicated individual who was getting into his car. The stop occurred in a high crime area in the early morning hours. While a license check was pending, the defendant made multiple motions toward a specific towel-wrapped object located in the front seat. Because of those motions the investigating officer directed a second officer to check out the object which proved to be a short-barrel rifle. In contrast, the case sub judice did not arise from a search conducted in an area warranting the label of "high crime". Nor did it take place in the pre-dawn hours and involve a defendant who appeared to be under the influence of some substance. More importantly, the movement seen by Deputy Harper was highly ambiguous as opposed to the Stevens situation where the movement was repeated and directed to a specific object in the front seat. Finally, unlike the case at bar, the Stevens officer did not pull the defendant out of the car and proceed to search for the object of the movement without even a pat-down. Instead, he made effective, cautious use of a second officer and thus demonstrated investigative efforts which were consistent with a reasonable and articulable belief that a

search of the vehicle was necessary to protect his person.

Inasmuch as no conflict exists between the decision of the Fifth District Court of Appeal and the Third District's decisions in State v. Brown, supra, and Stevens v. State, supra, the Respondent respectfully submits that this Honorable Court is without jurisdiction to exercise its discretionary review power.

CONCLUSION

BASED UPON the foregoing authorities and argument, the Respondent requests this Honorable Court to decline to accept jurisdiction.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

David A. Henson

DAVID A. HENSON
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida 32014-6183
Phone: 904/252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered, by mail, to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Robert Earl Dilyerd, 709 Vandergrift Drive, Ocoee, Florida 32761, on this 19th day of March, 1984.

David A. Henson

DAVID A. HENSON
ASSISTANT PUBLIC DEFENDER